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No. 09-1137

Supreme Court, U.S.
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In The Supreme Court of the United States

LOUISE VICTORIA JEFFREDO, *et al.*,

Petitioners,

v.

MARK A. MACARRO, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Petition should be denied because it presents no issue worthy of this Court's attention. The Ninth Circuit held that federal courts lack habeas corpus jurisdiction under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303, over an appeal from a tribal appellate body's decision affirming the disenrollment of individuals who fail to meet the tribe's longstanding constitutional enrollment criteria.[1] That decision made no new law. To the contrary, the Ninth Circuit merely adhered to 150 years of consistent legal precedent that tribes have authority to make their own internal membership decisions in tribal forums. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Red Bird v. United States (Cherokee Intermarriage Cases)*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897).

The Amended Opinion makes denial of certiorari even more appropriate. The Amended Opinion removed all analysis of the civil-versus-criminal nature of the tribal proceeding and emphasized that any non-tribal remedy for tribal membership disputes

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[1] Appendix A to the Petition ("Pet. App.") contains the lower court's initial opinion in this case On March 22, 2010, four days after the Petition was filed, the Ninth Circuit issued an "Order and Amended Opinion." The Order and Amended Opinion (hereinafter "Amended Opinion") is attached as Appendix A (hereinafter "Opp. App.") to this Opposition Brief. Any citations in this brief are to the Amended Opinion found in the Opposition Appendix, unless otherwise noted.

must be created by Congress and not the courts. The Amended Opinion reaffirmed that mere disenrollment (with a resulting lack of access to certain tribal facilities), but with no banishment, no arrest, no imprisonment, no fine, no eviction, no destruction of property, no personal restraint, no restriction on movement within the Reservation, and only a speculative threat of future exclusion do not constitute detention under § 1303. The Amended Opinion reaffirmed that if Petitioners are ever excluded from the Reservation, they would first need to exhaust tribal remedies under the Pechanga Band's Exclusion and Eviction Regulations prior to seeking habeas relief.

The petition fails to identify any meaningful conflict between the Amended Opinion and a decision of another United States court of appeals or a state court of last resort. *See* Sup. Ct. R. 10(a). It also fails to articulate any meaningful departure from accepted precedent. *See id.* For these reasons, the Temecula Band of Luiseno Mission Indians of the Pechanga Indian Reservation (hereinafter "Pechanga Band" or "Tribe") respectfully requests that the Court deny the petition.

STATEMENT OF THE CASE

A. Factual Background.

Petitioners want federal court review of a final, internal tribal membership decision after full due process and appellate review were provided in tribal

forums. Petitioners seek to use the habeas corpus provision of the Indian Civil Rights Act, 25 U.S.C. § 1303, to burden federal courts with an entirely new role as overseers of tribal enrollment disputes.

The Pechanga Band is a federally–recognized tribe. 72 Fed. Reg. 13648, 13649 (Mar. 7, 2007). Respondents Mark Macarro, Mark Calac, Marc Luker, Andrew Masiel, Sr., Russell Murphy and Kenneth Perez constitute the elected Tribal Council of the Pechanga Band. Respondent Darlene Azzerelli is the Tribal Secretary. Respondent Christine Luker was, at the time the suit was filed, Tribal Treasurer, and now remains a tribal member. Respondent Donna Barron was, at the time the suit was filed, a Tribal Council member, and now remains a tribal member.

The case's factual history is set forth in the Amended Opinion. Opp. App. at 4-9. In summary, the Pechanga Band's General Membership adopted the Pechanga Constitution in 1978 which includes the Tribe's membership criteria.[2] *See* Opp. App. at 4.

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[2] Petitioners' false assertion that the enrollment criteria were illegally changed (Pet. at 16) is without support anywhere in the record. The court below specifically noted that the subsection A criteria was the standard applied in this case. Opp App. at 6. Petitioners for the first time in the Petition assert that they qualify for enrollment under subsection B (Pet. at 24 n.16), a claim they have not raised previously and one which the Committee put them on notice was available to them. ER Tab 24, Vol. III, at 145 (Summons: "you should provide the Committee with all information that you believe shows you meet the Pechanga Band's eligibility requirements").

The General Membership adopted the Pechanga Enrollment Disenrollment Procedures ("Disenrollment Procedures")[3] in 1988 to provide due process and a procedure to correct mistakes that resulted when membership was mistakenly approved. Opp. App. at 5.

In late 2002 and early 2003, the Tribe's Enrollment Committee[4] received allegations that tribal members from five separate lines of descent failed to meet the Pechanga Constitution's membership qualifications.

The Tribal Council, exercising its responsibility under the Constitution and Bylaws "to uphold the individual rights of each member without malice or prejudice," ER Tab 11, Vol. II, at 077, directed the Committee to (1) use a fair and impartial decision process by a majority of the Committee to review the files, (2) follow Robert's Rules of Order, and (3) allow adequate time for presentation of evidence as required under the Disenrollment Procedures. *See* Opp.

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[3] The due process provided under the Disenrollment Procedures that were followed leading up to the decision to disenroll Petitioners and the tribal appellate process are identical to those in *Salinas v. LaMere*, where this court denied certiorari. *See* 547 U.S. 1147 (2006).

[4] The members of the Enrollment Committee were appointed by the Tribe's General Membership. ER Vol. II, Tab 25, at 149. As adult members of the Tribe at the time of the appointment, Petitioners were part of the General Membership. Consequently, the Petition's false statement that the Committee was "appointed by abusive tribal officials," Pet. at 3, 8, would, if true, apply equally to Petitioners.

App. at 7. After reviewing the facts concerning the first three lines of descent, the Enrollment Committee found that the affected tribal members did in fact meet the Pechanga Band's membership criteria. Review of the fourth line of descent resulted in a decision, affirmed on appeal, that members of that line did not meet the Pechanga Constitution's membership criteria. This Court denied a writ of certiorari from a state court appeal of that decision in *Salinas v. LaMere*, 547 U.S. 1147.[5]

The Enrollment Committee then reviewed allegations against Petitioners. After months of review, on May 3, 2005, the Enrollment Committee issued summonses to Petitioners stating the Committee believed grounds existed to initiate disenrollment procedures. *See* Opp. App. at 7-8. Pursuant to the Disenrollment Procedures, the Committee held Initial Meetings with Petitioners at which the Enrollment Committee

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[5] The lower court's decision is consistent with the decision of the California Court of Appeal in *Salinas v. LaMere*, 131 Cal.App.4th 1059 (Ct App. 4th Dist. 2005), that state courts lack jurisdiction in the same context. *Salinas* involved the same tribal constitutional membership criteria, the same procedural history, and the same tribal appellate process as this case. This Court declined to review *Salinas v. LaMere*, 547 U.S. 1147 (2006), just as it did *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 892 (2d Cir. 1996), *cert. denied*, 519 U.S. 1041 (1996), a case involving habeas corpus jurisdiction under the ICRA of the disenrollment and banishment of tribal members and which was relied on by the lower court. The Petition provides even less compelling reasons than were unpersuasively asserted in *Salinas* and *Poodry*.

provided all available documentation supporting the allegations and explained why the documentation raised questions regarding the Petitioners' constitutional membership qualifications. *See* Opp. App. at 8.

On March 6, 2006, the Enrollment Committee issued a 28-page Record of Decision, *see* ER Tab 29, Vol. III, at 398, that addressed all the available factual information from Tribal enrollment records, submissions by Petitioners, and a genealogical study prepared by Dr. Johnson.[6] The Record of Decision disenrolled Petitioners for failure to prove lineal descent from an original Pechanga Temecula person as required by the Pechanga Constitution. Opp. App. at 8.

Petitioners exercised their right of appeal to the Tribal Council which affirmed the Enrollment Committee's decision. Opp. App. at 8-9. The Tribal Council found that: (1) there was no evidence of unfair or partial treatment of the Petitioners by the Enrollment Committee; (2) there was no evidence of negligence in the handling of the Petitioners' case by the

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[6] The Petition falsely claims that the Tribe fired Dr. Johnson who had been hired to research historical records for the Enrollment Committee. The quote in the Petition attributed to Dr. Johnson's report is found nowhere in the report. His report states in pertinent part that "the identity of Paulina Hunter's father can be narrowed down to four men . . . Paulina's mother's identity is less certain" and her ancestors may have been from two communities only one of which was relevant to the constitutional enrollment criteria. ER Tab 27, Vol. III, at 243-244.

Enrollment Committee; and (3) there was insufficient proof that the Enrollment Committee violated the Disenrollment Procedures. Opp. App. at 8-9.

B. District Court Proceedings.

Petitioners filed a writ of habeas corpus in the District Court on May 22, 2007, alleging jurisdiction based on the ICRA habeas corpus provision, 25 U.S.C. § 1303. Respondents moved to dismiss for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and Petitioners opposed. *See* Pet. App. at 31a.

The district court granted the Tribe's motion, acknowledging that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." Pet. App. at 36a (citing *Santa Clara Pueblo*, 436 U.S. at 72); *see also Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007). The right to determine its own membership includes "the power to revoke that membership." Pet. App. at 37a; *Roff*, 168 U.S. at 222.

The district court found Petitioners' assertion that they had been "detained" within the meaning of 25 U.S.C. § 1303 was "not supported by the law or the facts." Pet. App. at 39a. The district court found that two of the Petitioners admitted in declarations that "they still reside on the Reservation, and none of the declarations contain allegations that Petitioners have

been denied access to the Reservation or otherwise physically detained." Pet. App. at 40a. The district court held that loss of privileges and mere speculation about some hypothetical future denial of access to the Reservation do not support habeas jurisdiction. Pet. App. at 41a. Quoting this Court's discussion of the ICRA habeas review of civil proceedings in *Santa Clara Pueblo*, the district court held that § 1303 does not apply to civil proceedings. Pet. App. at 38a.

The district court granted Respondents' motion to dismiss and Petitioners appealed to the Ninth Circuit.

C. United States Court of Appeals For The Ninth Circuit Decision

The Ninth Circuit issued its original opinion on December 22, 2009. Pet. App. at 1a. That first opinion affirmed based on three factors: (1) Petitioners were not detained, (2) Petitioners did not exhaust their tribal remedies, and (3) Petitioners' disenrollment was the result of a civil proceeding not subject to review under § 1303. Pet. App. at 19a.

On March 22, 2010, the Court of Appeals issued an Order and Amended Opinion. Opp. App. at 1. The Amended Opinion reaffirmed the district court's holding of lack of jurisdiction because of no detention and failure to exhaust tribal remedies.

Relying on *Santa Clara Pueblo* and the *Cherokee Intermarriage Cases*, the Amended Opinion recognized two baseline principles. First, "[o]rdinarily, federal courts lack jurisdiction to consider an appeal from a decision of an Indian Tribe to disenroll one of its members." Opp. App. at 9. Second, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." Opp. App. at 9 (quoting *Santa Clara Pueblo*, 436 U.S. at 72 n.32, and *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906)). The Court of Appeals then turned to Petitioners' unprecedential attempt to use habeas corpus to collaterally attack their disenrollment. Opp. App. at 9-10.

The Court of Appeals correctly held that federal jurisdiction under § 1303 requires a detention. Opp. App. at 10. The court found no banishment, no arrest, no imprisonment, no fine, no eviction, no destruction of their property, no personal restraint, no restriction on movement within the Reservation, and only limited denial of access to certain facilities.[7] Opp. App. at 12-13. The court rejected Petitioners' efforts to equate disenrollment with denaturalization, finding Petitioners "have not been left stateless, and

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[7] The Petition alleges wrongly that Lawrence Madariaga "can no longer use the Health Clinic." Pet. at 5. Mr. Madariaga's declaration in the court below states. "I have limited use of the clinic." ER Tab 12, Vol. II, at 088.

nothing in the record indicates that the disenrollment proceedings were undertaken to punish [Petitioners]." Opp. App. at 17. The lower court could "find no precedent for the proposition that disenrollment alone is sufficient to be considered detention under § 1303." Opp. App. at 15.

The court also rejected Petitioners' assertion that disenrollment with potential banishment is equal to detention under § 1303. Speculative future exclusion or eviction under tribal law is not detention for which habeas relief is available. Opp. App. at 14. If the Tribe were ever to banish Petitioners, they would have tribal remedies available and would need to exhaust those before attempting to seek habeas corpus review. Opp. App. at 18 *See Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 16 n.8 (1987).

REASONS FOR DENYING THE PETITION

1. The decision below presents no issue worthy of this Court's attention. The Petitioner's main contention is that ICRA's habeas corpus provision applies to civil as well as criminal proceedings. Pet. at i, 8-16. While the Pechanga Band agrees with the Court of Appeals' original opinion on this issue (Pet. App. at 16a-19a), the Amended Opinion removed all analysis of the civil-versus-criminal nature of the tribal proceeding. Therefore, Petitioners' primary rationale for certiorari is moot.

2. The Petition does not allege there is a split on any issue raised in the Amended Opinion. Detention under the ICRA is interpreted consistently with the same requirement in non-tribal habeas corpus law. Opp. App. at 10. The Amended Opinion is consistent with the Second Circuit's decision in *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708 (2d Cir. 1998), holding that loss of a "voice" in the tribal community, loss of health insurance, loss of access to certain facilities, and loss of place on the membership roll do not constitute detention for purposes of habeas jurisdiction under the ICRA. It is also consistent with *Poodry*, 85 F.3d at 876, 878, holding that conviction for treason, permanent banishment, and permanent loss of all tribal rights represented a significant enough intrusion on liberty to constitute detention sufficient for habeas review under the ICRA. *See* Opp. App. at 12. The lower court's decision also is consistent with the decision of the Court of Appeal for the State of California in *Salinas*, 131 Cal.App.4th 1059, which held that state courts do not have jurisdiction under similar facts. *Salinas* involved the same constitutional membership criteria, the same procedural process, and the same tribal appellate process as existed in this case.

3. The Amended Opinion did not decide an important federal question in a way that conflicts with relevant decisions of this Court. To the contrary, the Amended Opinion rests on two well-settled principles long affirmed by this Court. First, "[a] tribe's right to

define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." Opp. App. at 9; *see Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906). Second, "[g]iven the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." Opp. App. at 10; *Santa Clara Pueblo*, 436 U.S. at 72 n.32. Consistent with *Santa Clara Pueblo*, 436 U.S. at 60, the amended opinion recognized that "while Congress may have authority in these matters, in the complete absence of precedent, we cannot involve the courts in these disputes." Opp. App. at 16. Since passing the ICRA, Congress has limited, not expanded, habeas review. *See, e.g.*, 28 U.S.C. §§ 2254, 2255 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L.No. 104-132, § 104, 112 Stat. 1214 (1996).

4. The Petition at most seeks review based on the contention that the court below misapplied a properly stated rule of law. This is not a persuasive basis for granting *certiorari*. Sup. Ct. R. 10. The Petition concedes that the court below used the proper test for detention articulated in *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973). Pet. at 17; Opp. App. at 14. Petitioners simply disagree with the lower court's application of the law to the facts. Under the standard in *Hensley*, denial of access to a senior center and a health clinic, and potential banishment

in the future are simply not a severe restraint on individual liberty warranting the extraordinary remedy of habeas corpus. Opp. App. at 15.

Similarly, the Petition urges the court to review the lower court's application of *Trop v. Dulles*, 356 U.S. 86 (1958), not because the lower court used the wrong standard, but simply because Petitioners would prefer a different result. The court below correctly found *Trop* to be inapposite to this case. "Appellants have not been left stateless, and nothing in the record indicates that the disenrollment proceedings were undertaken to punish Appellants." Opp. App. at 17.

The Pechanga Band, like the court below, recognizes that tribal enrollment determinations have significant consequences, both for the effected individuals and for the Tribe. That is why the Tribe has an independent Enrollment Committee and codified tribal laws governing enrollment issues. The Pechanga Band's Disenrollment Procedures, as accurately outlined in the Amended Opinion, afford due process consistent with the requirements of the ICRA, 25 U.S.C. § 1302(8). The ICRA's habeas provision does not provide unhappy tribal litigants with a means to defeat primary tribal jurisdiction over internal enrollment determinations where, as here, no detention exists. "The courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." Felix S. Cohen, *Handbook of Federal Indian Law*, at 20 (1982 ed.).

CONCLUSION

Respondents respectfully request that the petition for certiorari be denied.

Respectfully submitted,

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DATED: April 20, 2010

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUISE VICTORIA JEFFREDO, JOYCE JEAN JEFFREDO-RYDER, CHRISTOPHER L. RYDER, JEREMIAH S. RYDER, JONATHAN B. RYDER, MICHAEL JOHN JEFFREDO, ELIZABETH VILLINA JEFFREDO, JACKIE M. MADARIAGA, KELLY M. MADARIAGA, CARRIE MADARIAGA, LAWRENCE MADARIAGA, WILLIAM A. HARRIS, STERLING HARRIS, APRIL HARRIS, MINDY PHENEGER, RICHARD HARRIS;

Petitioners-Appellants,

v.

MARK A. MACARRO, DONNA BARRON, MARC CALAC, MARK LUKER, ANDREW MASIEL, RUSSELL BUTCH MURPHY, KENNETH PEREZ, DARLENE AZZARELLI, CHRISTINE LUKER;

Respondents-Appellees.

No. 08-55037

D.C. No. CV-07-01851-JFW

ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted
April 17, 2009 – Pasadena, California

Filed December 22, 2009
Amended Opinion Filed March 22, 2010

Before: Johnnie B. Rawlinson and N. Randy Smith, Circuit Judges, and Claudia Wilken,* District Judge.

Opinion by Judge N.R. Smith;
Dissent by Judge Wilken

COUNSEL

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Frank Lawrence, Holland and Knight, Los Angeles, California, and John Schumacher, Law Office of John Schumacher, LLC, Riverton, Wyoming, for the respondents-appellees.

ORDER

The opinion and dissent filed on December 22, 2009, and reported at 590 F.3d 751 are hereby amended. An amended opinion and dissent are filed concurrently with this order.

No petition for rehearing or rehearing en banc was filed within the original time period, and that

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* The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

time period has now expired. No subsequent petitions for rehearing or rehearing en banc shall be filed.

IT IS SO ORDERED.

OPINION

N.R. SMITH, Circuit Judge:

The Pechanga Band of the Luiseño Mission Indians ("Pechanga Tribe") disenrolled a number of its members ("Appellants") for failing to prove their lineal descent as members of the Tribe. Federal courts generally lack jurisdiction to consider any appeal from the decision of an Indian tribe to disenroll one of its members. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Appellants, therefore, brought this petition for habeas corpus under 25 U.S.C. § 1303 of the Indian Civil Rights Act ("ICRA"), claiming their disenrollment by members of the Pechanga Tribal Council ("Appellees") was tantamount to an unlawful detention. Despite the novelty of this approach and despite the potential injustice of this situation, we nonetheless lack subject matter jurisdiction to consider this claim, because Appellants were not detained. Therefore, Appellants cannot bring their claims under § 1303 of the ICRA and we must affirm the district court. Only Congress can aid these appellants.

I. BACKGROUND

The Pechanga Tribe is a federally-recognized Indian tribe. 72 Fed. Reg. 13648, 13650 (Mar. 22, 2007). The Tribe's ultimate governing authority consists of all of the adult members of the Tribe ("General Membership"). On December 10, 1978, the Pechanga Tribe adopted the Constitution and Bylaws of the Temecula Tribe of Luiseño Mission Indians ("Pechanga Constitution"). Article II of the Pechanga Constitution provides:

> Membership is an enrolled member documented in the Band's Official Enrollment Book of 1979.
>
> Qualifications for membership of the Temecula Band of Luiseno Mission Indians Are:
>
> A. Applicant must show proof of Lineal Descent from original Pechanga Temecula people.
>
> B. Adopted people, family or Band, and non-indians cannot be enrolled. *Exception*: People who were accepted in the Indian Way prior to 1928 will be accepted.
>
> C. If you have ever been enrolled or recognized in any other reservation you cannot enroll in Pechanga.

At issue here is subsection A, requiring applicants to "show proof of Lineal Descent from original Pechanga Temecula people." In late 2002 and early 2003, the Enrollment Committee received information from its members alleging that a number of

Pechanga Tribe members were not lineal descendants from the original Pechanga Temecula people. Therefore, according to the Pechanga Enrollment Disenrollment Procedure ("Disenrollment Procedures"), the Enrollment Committee was required to investigate the allegations. Allegations surrounded five lines of descent that allegedly did not qualify for membership under the Pechanga Constitution.

According to the Pechanga Disenrollment Procedure, disenrollment is "revoking a person's membership when it is found that they do not meet the requirements set forth on the enrollment application which was approved by the Band." The Disenrollment Procedures were adopted by the Pechanga Tribe (1) to correct mistakes that resulted when tribal membership was mistakenly approved and (2) to provide a process that would allow a fair hearing in the disenrollment procedure. Under the Disenrollment Procedures, the Enrollment Committee initiates a disenrollment process against those individuals allegedly not qualifying for membership in the Tribe. After the initiation of the disenrollment, the Enrollment Committee must provide adequate notice to the individual to be summoned to a meeting with the Enrollment Committee. The notice must (1) state that the Enrollment Committee has questions regarding enrollment; (2) stress the importance of responding to the notice; and (3) request a meeting within thirty days of the response. Unless the person receiving the notice chooses to be automatically disenrolled, he or she must respond. Once a response has been filed, the

Enrollment Committee has thirty days to set up a meeting. At that meeting, the Enrollment Committee must show specific evidence that would prove that the documentation provided for enrollment does not provide evidence of lineal descent. If the Enrollment Committee provides such evidence, the individual then is allowed another thirty days to provide additional information to prove her or his lineal descent. If the individual provides further evidence that satisfies the Enrollment Committee as to his lineal descent, the process is terminated and the individual keeps his or her membership status. If the Enrollment Committee is not satisfied by the further evidence, the individual will be disenrolled and the Tribal Council is notified of the disenrollment.

If the Enrollment Committee fails to follow these steps or is negligent in any way, the individual can appeal to the Tribal Council for a fair hearing. At the hearing, the Tribal Council only reviews the documentation that the Enrollment Committee reviewed. The individual is not entitled to legal representation at the hearing. If the Tribal Council finds there was an error, the Enrollment Committee reevaluates the case. If the appeal is successful, membership will be reinstated.

Disenrollment does not mean that a person is banished from the Pechanga Reservation. The Pechanga Tribe instead has specific procedures for exclusion and eviction. These requirements are set forth in the "Exclusion and Eviction Regulations." Under these regulations, the Pechanga Tribe may

exclude and or evict someone from the reservation for: "(1) [v]iolating tribal laws and ordinances; (2) [c]reating conditions which pose a threat to the public health, safety and welfare; (3) [e]ngaging in criminal activities on the Pechanga Reservation, by finding of the Tribal Council, or being convicted of one or more felony crimes; (4) [b]eing declared a public nuisance by the Tribal Council; [or] (5) [c]reating a breach of peace, including but not limited to public drunkenness." The Exclusion and Eviction Regulations dictate the procedure to evict and or exclude and the opportunity to appeal such exclusion.

In early 2003, the Enrollment Committee began addressing the allegations regarding the lineal descent of certain members. On March 7, 2003, the Tribal Council issued a Notice and Order regarding pending disenrollment matters. The Notice and Order mandated that the Enrollment Committee: (1) "use a fair and impartial decision by a majority of the committee to review a file;" (2) follow Robert's Rules of Order; and (3) allow adequate time for presentation of evidence as required under the Disenrollment Procedures.

Sometime before March 7, 2003, the Enrollment Committee determined that the first three lines of descent met the membership criteria. Then it turned its attention to those members who claimed a lineal descent through Paulina Hunter. On May 3, 2005, after a proper vote, the Enrollment Committee summoned Appellants and notified them that the Enrollment Committee believed there were grounds to

initiate the disenrollment process. The summonses (1) notified Appellants that the disenrollment procedures had been initiated, (2) requested additional information concerning Appellants' family history, and (3) notified Appellants that they were required to set up an Initial Meeting with the Enrollment Committee.

Meetings were held with Appellants in June of 2005. The Enrollment Committee provided Appellants with a copy of all factual records in its possession. The Enrollment Committee then stated its concerns about each Appellant's claim of lineal descent. Appellants were also notified that they had thirty days to submit information supporting their claim of lineal descent. The Enrollment Committee emphasized that Appellants' enrollment would be measured by the Pechanga Constitution's requirements. The Enrollment Committee advised each Appellant that no decision would be made until it received all additional information.

On March 16, 2006, the Enrollment Committee (after review of the full record) disenrolled Appellants for failure to prove lineal descent from an original Pechanga Temecula person. Appellants exercised their right to appeal to the Tribal Council. The Tribal Council held hearings on July 21, 2006. The Tribal Council affirmed the Enrollment Committee, "finding: (1) there was no evidence of unfair or partial treatment of Appellants by the Enrollment Committee; (2) there was no evidence of negligence in the handling of Appellants' case by the Enrollment Committee;

and (3) there was insufficient proof that the Enrollment Committee violated the disenrollment procedures."

Appellants then filed a petition for writ of habeas corpus in the Central District of California. Appellants moved for summary judgment. Appellees filed a Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, claiming that the district court lacked subject matter jurisdiction. The district court granted the Motion to Dismiss. Appellants appealed the district court decision.

II. DISCUSSION

We review *de novo* dismissals for lack of subject matter jurisdiction under Rule 12(b)(1). *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 826 (9th Cir. 2004). We also review *de novo* a district court's denial of a petition for writ of habeas corpus under the ICRA. *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 951 (9th Cir. 1998).

Ordinarily, federal courts lack jurisdiction to consider an appeal from the decision of an Indian Tribe to disenroll one of its members. "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906)). Because of this precedent, Appellants did not directly appeal the Tribe's decision. Instead, they petitioned the court for a writ of habeas

corpus under the ICRA to collaterally challenge their disenrollment.

Section 1303 of the ICRA provides: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. The term "detention" in the statute must be interpreted similarly to the "in custody" requirement in other habeas contexts. *See Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001) ("There is no reason to conclude that the requirement of 'detention' set forth in the Indian Civil Rights Act § 1303 is any more lenient than the requirement of 'custody' set forth in the other habeas statutes." (citation omitted)). Further, "[g]iven the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." *Santa Clara Pueblo*, 436 U.S. at 72 n.32. Therefore, an ICRA habeas petition is only proper when the petitioner is in custody. *Id.* at 791 (explaining the custody requirement).

We have also held that a litigant must first exhaust tribal remedies before properly bringing a petition for writ of habeas corpus. *Selam*, 134 F.3d at 953-54 (explaining the exhaustion requirement); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* § 9.09 (2005). Even when a federal court has jurisdiction over a claim, if the claim arises in Indian country, the court is required to "stay its hand" until the party has exhausted all available tribal remedies.

Cohen, *Handbook of Federal Indian Law* § 7.04 (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985)). "The Supreme Court's policy of nurturing tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims." *Selam*, 134 F.3d at 953. There is authority for relaxing the exhaustion requirement where the party can show that exhaustion would be futile or that tribal courts offer no adequate remedy. *See id.* at 954.

Therefore, "all federal courts addressing the issue mandate that two prerequisites be satisfied before they will hear a habeas petition filed under the IRCA [sic]: [(1)] The petitioner must be in custody, and [(2)] the petitioner must first exhaust tribal remedies."). Cohen, *Handbook of Federal Indian Law* § 9.09 & § 9.09 n.280. We therefore have no jurisdiction to hear a petitioner's claim for habeas corpus, unless both of these conditions are met. Any expansion of this jurisdiction must come from Congress, not by decision of this court.

I. Appellants do not meet the requirements for the court to have jurisdiction under § 1303 of the ICRA.

A. Appellants were not detained/in custody.

Appellants contend that (1) the actual restraints, (2) the potential restraints, and (3) their lost Pechanga

identity all amount to detention under § 1303. We do not agree.

1.

Appellants contend that, because they have been denied access to the Senior Citizens' Center, cannot go to the health clinic, and their children can no longer go to tribal school, they have been detained. We disagree. *Jones v. Cunningham* requires that "conditions and restrictions . . . significantly restrain [one's] liberty" in order to invoke § 1303 jurisdiction. 371 U.S. 236, 243 (1963). The Second Circuit has said that "under *Jones* and its progeny, a severe actual or potential restraint on liberty" is necessary for jurisdiction under § 1303. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996); *see also Shenandoah v. Halbritter*, 275 F. Supp. 2d 279, 285 (N.D.N.Y. 2003) (quoting *Poodry* for the same proposition). We agree with our colleagues on the Second Circuit and hold that § 1303 does require "a severe actual or potential restraint on liberty." *Poodry*, 85 F.3d at 880.

In the case before us, the denial of access to certain facilities does not pose a severe actual or potential restraint on the Appellants' liberty. Appellants have not been banished from the Reservation. Appellants have never been arrested, imprisoned, fined, or otherwise held by the Tribe. Appellants have not been evicted from their homes or suffered destruction of their property. No personal restraint (other than

access to these facilities) has been imposed on them as a result of the Tribe's actions. Their movements have not been restricted on the Reservation. Faced with a similar situation, the Second Circuit also determined that less severe restraints such as loss of one's "voice" in the community, loss of health insurance, loss of access to tribal health and recreation facilities, loss of quarterly distributions to tribal members, and loss of one's place on the membership roles of the tribe are simply "insufficient to bring plaintiffs within [the] ICRA's habeas provision." *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708, 714 (2d Cir. 1998).

Appellants contend that the denial of access to these facilities is similar to the restraint found in *Poodry*. This is not *Poodry*. In *Poodry*, the petitioners were convicted of treason, sentenced to permanent banishment, and permanently lost any and all rights afforded to tribal members. *See Poodry*, 85 F.3d at 876, 878. Appellants have not been convicted, sentenced, or permanently banished. We therefore hold that the limitation of Appellants' access to certain tribal facilities does not amount to a "detention."

2.

Appellants contend that, as non-members of the tribe, they are "under a continuing threat of banishment/exclusion." No court has held that such a threat

is sufficient to satisfy the detention requirement of § 1303.

> The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

Hensley v. Mun. Court, 411 U.S. 345, 351 (1973). Applying this principle, we previously held that a threat of confinement is not severe nor immediate enough to justify the writ. *Edmunds v. Won Bae Chang*, 509 F.2d 39, 40-41 (9th Cir. 1975) (denying habeas relief under 28 U.S.C. §§ 2241, 2254). In *Edmunds*, the petitioner was subject to a court-imposed fine, which could be enforced by jail time. *Id.* at 41. The court held, however, that until confinement is imminent (like the confinement in *Hensley*) there can be no justification for use of the habeas corpus remedy. *Id.* We see no reason not to analogize to the court's construction of the criminal habeas corpus provisions in *Edmunds*. Therefore, we hold that the potential threat of future eviction is not sufficient to satisfy the detention requirement of § 1303.

Appellants argue that, while no such procedures have been commenced to exclude or evict Appellants,

there is a potential that they could be excluded. Under the Pechanga Non-Member Reservation Access and Rental Ordinance "[a]ccess to and residency within the Reservation is a privilege which may be granted or denied to an individual upon proper authority of the Pechanga Band." However, the Pechanga Tribe enacted exclusion and eviction regulations that provide a process for eviction in an effort to protect law and order on the reservation and to provide uniform procedures for exclusion and eviction. These provisions apply equally to those who have been disenrolled and those who are current members of the tribe. Appellants admit they have never been subjected to exclusion or eviction proceedings.

3.

Appellants lastly contend that disenrollment, stripping them of their Pechanga citizenship, is enough of a significant restraint on their liberty to constitute a detention. While we have the most sympathy for this argument, we find no precedent for the proposition that disenrollment alone is sufficient to be considered detention under § 1303. While "Congress' authority over Indian matters is extraordinarily broad . . . the role of courts in adjusting relations between and among tribes and their members [is] correspondingly restrained." *Santa Clara Pueblo*, 436 U.S. at 71. Further, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Id.* at 71 n.32 (citing *Roff v.*

Burney, 168 U.S. 218 (1897); *Cherokee Intermarriage Cases*, 203 U.S. 76). We have also noted that "[a]n Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress." *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007). Thus (while Congress may have authority in these matters) in the complete absence of precedent, we cannot involve the courts in these disputes.

This court is without jurisdiction to review direct appeals of tribal decisions regarding disenrollment of members. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 72 n.32. We cannot circumvent our lack of jurisdiction over these matters by expanding the scope of the writ of habeas corpus to cover exactly the same subject matter. At its heart, this case is a challenge to disenrollment of certain members by the tribe. It is precisely because we lack jurisdiction to hear such claims, however, that Appellants brought this case under habeas corpus law. We find (and the parties direct us to) nothing in the legislative history of § 1303 that suggests the provision should be interpreted to cover disenrollment proceedings. Because nothing in the legislative history suggests otherwise and because binding precedent precludes review of disenrollment proceedings, we cannot accept Appellants' invitation to expand habeas corpus here.

Appellants contend that their disenrollment is analogous to denaturalization. We disagree. Appellants cite *Trop v. Dulles*, 356 U.S. 86 (1958), to support this proposition. The court in *Trop* was confronted with the constitutionality of a statute that

revoked United States citizenship for desertion during wartime even if the desertion was unrelated to any actions on behalf of a foreign government. *Id.* at 87-88. *Trop* is inapposite to this case. In *Trop* the statute left the defendant stateless. *Id.* Further, the statute was penal in nature. *Id.* at 96. Here Appellants have not been left stateless, and nothing in the record indicates that the disenrollment proceedings were undertaken to punish Appellants. Therefore, *Trop* is not controlling.

We do not wish to minimize the impact of the Tribe's membership decision on Appellants. Indeed, we recognize that Appellants have suffered a significant loss. Nevertheless, such loss is simply not equivalent to detention. This is not the first time that we have noted that we do not have jurisdiction to review membership decisions, even when the results of such decisions appear unfair. In *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005), the plaintiff-appellants likewise sought judicial review of a tribal membership decision. We stated, "[a]lthough [plaintiffs'] claim to membership appears to be a strong one, as their father is a recognized member of the tribe, their claim cannot survive the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes." *Id.* at 960. In *Lewis* we further noted that our jurisdiction in these matters may prevent us from intervening even when fairness may seem to dictate otherwise. There we said, "[w]e agree with the district court's conclusion that this case is deeply troubling on the level of

fundamental substantive justice. Nevertheless, we are not in a position to modify well-settled doctrines of sovereign immunity. This is a matter in the hands of a higher authority than our court." *Id.* at 963.

B. Appellants have not exhausted their tribal remedies in order to challenge a claim of banishment from the reservation.

Appellants argue that disenrollment is similar to banishment and that they are therefore detained. However, Appellants have not been banished from the Reservation. The Pechanga Tribe has established uniform Exclusion and Eviction Regulations for excluding both members and nonmembers of the tribe from the Reservation. The Exclusion and Eviction Regulations also establish the procedures for appealing one's exclusion or eviction. Appellants have not been subjected to any exclusion or eviction proceedings. Therefore, they have not exhausted their claims for exclusion from the reservation or denial of access to it as established in the Exclusion and Eviction Regulations. We thus lack jurisdiction over any of Appellants' claims for exclusion or eviction.

III. CONCLUSION

The district court properly dismissed Appellants' action for lack of subject matter jurisdiction. Appellants were not detained and did not exhaust their tribal remedies. Therefore, they cannot get relief

under the habeas corpus provision of the ICRA. Accordingly, we affirm the district court.

AFFIRMED

WILKEN, District Judge, dissenting:

Appellants, enrolled members of the Pechanga Tribe since birth, filed a petition for a writ of habeas corpus under the Indian Civil Rights Act (ICRA) asserting that their Tribal Council violated the due process, equal protection, free speech and cruel and unusual punishment clauses of the Act when it stripped them of membership in the Tribe. The membership criteria that the Tribal Council applied were not established until 1979; the procedures it used to disenroll Tribal members were not established until 1988; and the Tribal Council did not begin disenrolling large numbers of members until recently, when the Tribe's casino profits became a major source of revenue.[1] Appellants allege that they are victims of the Tribal Council's greed associated with these casinos.

The majority concludes that the district court properly dismissed Appellants' petition for lack of subject matter jurisdiction because Appellants (1) were not detained and (2) did not exhaust their Tribal

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[1] At the time of Appellants' disenrollment, every adult Pechangan received a per capita benefit of over $250,000 per year.

remedies. I respectfully dissent and address each argument in turn.

I. Indian Civil Rights Act (ICRA)

Beginning in 1961, through hearings and surveys, Congress commenced an investigation into the conduct of tribal governments due to abuses that some tribal members were enduring at the hands of tribal officials. In 1968, Congress enacted ICRA to protect against such abuses by imposing restrictions upon tribal governments similar to those contained in the Bill of Rights and the Fourteenth Amendment. The enforcement mechanism Congress provided was that of habeas corpus in federal courts. The statute at issue, 25 U.S.C. § 1303, provides, "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." A central purpose of ICRA was to "'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (quoting S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967)).

A. Detention

"Detention" by order of an Indian tribe is the sole jurisdictional prerequisite for federal habeas review. The requirement in § 1303 that an individual be

"detained" is akin to the "in custody" and "detention" requirement in other habeas statutes. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 891 (2d Cir. 1996), *cert. denied*, 519 U.S. 1041 (1996) ("Congress appears to use the terms 'detention' and 'custody' interchangeably in the habeas context."). The habeas statutes analogous to § 1303 refer to "detention" as well as "in custody" throughout. *See* 28 U.S.C. §§ 2242, 2243, 2245, 2249, 2253 and 2255. "There is no reason to conclude that the requirement of 'detention' set forth in the Indian Civil Rights Act § 1303 is any more lenient than the requirement of 'custody' set forth in the other federal habeas statutes." *Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001). Nor is there any reason to conclude that the requirement of "detention" in § 1303 is any more strict than the requirement of "custody" or "detention" in the other federal habeas statutes.

The custody or detention requirement may be met if the habeas petitioner is not physically confined. *Jones v. Cunningham*, 371 U.S. 236, 239-40 (1963); *see Dow v. Court of the First Circuit Through Huddy*, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam) (holding that a requirement to attend fourteen hours of alcohol rehabilitation constituted custody; requiring petitioner's physical presence at a particular place "significantly restrain[ed] [his] liberty to do those things which free persons in the United States are entitled to do"), *cert. denied*, 510 U.S. 1110 (1994).

The detention requirement is designed to limit the availability of habeas review "to cases of special

urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." *Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973). Therefore, the inquiry into whether a petitioner has satisfied the jurisdictional prerequisite for habeas review requires a court to judge the "severity" of an actual or potential restraint on liberty.

The combination of the current and potential restrictions placed upon Appellants and the loss of their life-long Pechanga citizenship constitute a severe restraint on their liberty. The majority analyzes each of these grounds separately, instead of collectively, and determines that none amounts to a detention. I respectfully disagree with this approach.

When Tribal members are disenrolled, they become "non-members" of the Tribe and lose all rights associated with being a Pechanga citizen. One of those rights is access to the Pechanga Reservation. The Pechanga Non-Member Reservation Access and Rental Ordinance (Reservation Access Ordinance) states, "The custom, tradition and practice of the Pechanga Band has always been, and remains, that the Pechanga Reservation is closed to non-members. Access to and residency within the Pechanga Reservation is a privilege which may be granted or denied to an individual upon proper authority of the Pechanga Band."

Elsewhere, the Reservation Access Ordinance provides, "Use by non-members of roads within the Pechanga Reservation is . . . by permission of the

Tribal Council and is subject to revocation at any time and for any reason." The Ordinance establishes that a non-member may enter the Pechanga Reservation only upon invitation by the Tribal Council or by an enrolled member of the Pechanga Band. Otherwise, access to the Pechanga Reservation by non-members is prohibited.

Since being disenrolled, Appellants have been excluded from the school, the health clinic and the senior citizens' facilities on the Reservation. Some of the Appellants live on the Reservation. Although they may enter the Reservation and travel to their homes, any Tribal Ranger can take away that liberty at any moment.

Pechanga Tribal Rangers have the authority and discretion summarily to exclude non-members from the Pechanga Reservation for up to seven days for any of the following reasons:

(1) suspicion that a non-member has committed a violation of any applicable tribal, state or federal law within the Pechanga Reservation;

(2) suspicion that a non-member is a danger to himself, herself or others;

(3) a finding by a Tribal Ranger that a non-member is a public nuisance; or

(4) any behavior which is suspicious or not consistent with a legitimate visit either to a tribal enterprise for business or patronage purposes, or to the home of a

> resident of the Pechanga Indian Reservation by invitation and in compliance with the Non-Member Reservation Access and Rental Ordinance.

Thus, a parent could, without warning, be barred from going home for a week by a Tribal Ranger who observes "any behavior that is suspicious." That Appellants have not been removed thus far does not render them free or unrestrained. Appellants may currently be able to "come and go" as they please, *cf. Hensley*, 411 U.S. at 351, but their current status as non-members living on the Pechanga Reservation means that at any point they may be compelled to "go," and be no longer welcome to "come." That is a severe restraint to which the members of the Pechanga Band are not generally subject. *See id.*

The majority analogizes the severe restraint Appellants confront with that in a case involving a twenty-five dollar fine. *Edmunds v. Won Bae Chang*, 509 F.2d 39, 41 (9th Cir. 1975). In that case, the court held that Edmunds was not subjected to a severe restraint because there was "no provision in the sentence for his confinement in the case of nonpayment." *Id.* The court generally observed that "a threat of incarceration is implicit in any court-imposed fine, for jail is one of the sanctions by which courts enforce their judgments and orders." However, in the circumstances of *Edmunds*, "confinement [was] no more than a speculative possibility – 'the unfolding of events may render the entire controversy academic.'" *Id.* (quoting *Hensley*, 411 U.S. at 352).

Analogizing the current and potential penalties involved in this case with a twenty-five dollar fine and the speculative possibility that failure to pay the fine may result in judicial proceedings leading to confinement trivializes the severity of Appellants' situation.

Furthermore, Appellants have been stripped of their life-long Pechanga citizenship, which by itself constitutes a severe deprivation. A deprivation of citizenship is "an extraordinarily severe penalty" with consequences that "may be more grave than consequences that flow from conviction for crimes." *Klapprott v. United States*, 335 U.S. 601, 611-12 (1949). The Supreme Court has found the penalty of denationalization of a natural-born citizen, sought to be imposed after conviction for military desertion, to be unconstitutional. *See Trop v. Dulles*, 356 U.S. 86, 104 (1958).

> It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.
>
> . . . .
>
> This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be

> terminated. He may be subject to banishment, a fate universally decried by civilized people. . . . It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

Id. at 101-102. A "deprivation of citizenship does more than merely restrict one's freedom to go or remain where others have the right to be: it often works a destruction of one's social, cultural, and political existence." *Poodry*, 85 F.3d at 897. Although with disenrollment Appellants retain their United States citizenship and will not be physically stateless, they have been stripped of their life-long citizenship and identity as Pechagans [sic]. This is more than just a loss of a label, it is a loss of a political, ethnic, racial and social association. William C. Canby, Jr., *American Indian Law in a Nut Shell* §§ III.B-C (5th ed. 2009); Felix S. Cohen, *Handbook of Federal Indian Law* § 3.03 (2005). Such a loss constitutes a restraint on liberty that, combined with the actual and potential restraints described above, satisfies the detention requirement under § 1303, in my opinion.

The majority, in dicta, implies that we may not hear Appellants' ICRA claims because we generally do not have jurisdiction to review tribal membership decisions. Here, Appellants are not directly challenging the merits of their disenrollment, i.e. whether they are direct descendants from the original Pechanga Temecula people. Rather, Appellants challenge

under ICRA the manner of their disenrollment. The former would be barred by tribal sovereign immunity, whereas the latter is not.

B. Exhaustion

The majority concludes that we lack jurisdiction over any claims for exclusion or eviction because Appellants have not exhausted their Tribal remedies for such claims or demonstrated that exhaustion would be futile. But Appellants are not asserting jurisdiction based on any exclusion or eviction from the Pechanga Reservation. Rather, Appellants' claim of jurisdiction is based on the restraints on their liberty arising from being disenrolled and threatened with exclusion. Notably, the parties agree that Appellants have completed the internal Tribal appeal process for challenging disenrollment. Further, there does not appear to be any remedy available to Appellants if they were to be given a seven-day exclusion without warning. Appellants have exhausted their claims and their habeas petition is ripe for adjudication.

II. Conclusion

When viewed together, the act of stripping Appellants' Tribal citizenship and the current and potential restrictions placed upon Appellants constitute a severe restraint on their liberty. Therefore, Appellants have been detained within the meaning of § 1303.

Accordingly, I would reverse and remand to the district court to hear their petition for a writ of habeas corpus on its merits.